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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL WILLIAMS,

Defendant and Appellant.

A099284

(Contra Costa County  
Super. Ct. No. 0107193)

Darrell Williams appeals his second degree murder conviction. (Pen. Code, § 187.) Williams contends that the jury instructions injected a legally erroneous felony-murder theory into the case. We agree that an erroneous instruction was given, but conclude that the error was harmless and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 28, 2001, at about 3:00 a.m., Williams and five passengers pulled into a gas station. Williams had been drinking; a forensic pathologist later estimated his blood-alcohol level at .25 percent.

One of the passengers, Jennifer Jones, got out to purchase cigarettes, but got into an argument with the station clerk and returned to Williams's car. As Williams pulled out, he hit Louis Roberson, who had walked in front of the car. Jones saw Roberson go under the car. She testified that she screamed for Williams to stop; others were screaming to be let out. A second passenger, Tamika Armstrong, testified at trial that no

one said anything about someone being hit; in response, the prosecution introduced Armstrong's statement from the preliminary examination that Jones had yelled, "You hit the man" as Williams drove off. Conflicting testimony was introduced as to whether Williams's car was driving normally or was jerking as it left the gas station. Tragically, Roberson was caught under a wheel of the car.

Williams drove several blocks before stopping. Everyone got out. Jones could see Roberson still stuck under the car, apparently alive. She said something like, "He's still under the car." An unidentified male passenger threatened Jones not to say anything to anyone. The male passenger and Williams got back in the car, with the passenger now behind the wheel, and drove off, leaving the remaining passengers behind. At some point Roberson's body finally came dislodged. Roberson died of head and chest injuries and asphyxia.

Police tracked down Williams by 4:30 a.m. They found blood and scrape marks on his car. Williams was glassy-eyed and smelled of alcohol. He denied driving the car since 10:00 p.m. and denied drinking more than a single beer. Williams was arrested.

An information charged Williams with murder (Pen. Code, § 187—count one), gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)—count two), felony leaving the scene of an accident (Veh. Code, § 20001, subd. (a), (b)(2)—count three), misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)—count four), misdemeanor driving with a blood-alcohol level above .08 percent (Veh. Code, § 23152, subd. (b)—count five), and various enhancements.

A jury convicted Williams on all counts and enhancements. The trial court sentenced Williams to 15 years to life for second degree murder.

On appeal, Williams contends that the trial court erred by giving an instruction, CALJIC No. 8.51, "Murder and Manslaughter Distinguished—Nature of Act Involved," that injected the doctrine of felony murder into the case, without giving additional instructions to clarify the application of the doctrine. In the alternative, Williams contends that his trial counsel was ineffective for allowing CALJIC No. 8.51 to be given

in an unmodified form. We agree that instructional error occurred, but disagree with Williams's contention that that error was prejudicial.<sup>1</sup>

#### DISCUSSION

The trial court instructed the jury as follows: “*If a person causes another's death while committing another felony which is dangerous to human life, the crime is murder.* If a person causes another's death while committing a misdemeanor, which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter. [¶] There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied and the crime is murder.” (CALJIC No. 8.51, italics added.)

The People concede that it was error to give the first sentence of this instruction, because the felony-murder rule had no place in this case. Murder “is the unlawful killing of a human being . . . with malice aforethought.” (Pen. Code, § 187, subd. (a).) “The felony-murder rule operates . . . to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of *all* felonies inherently dangerous to human life.” (*People v. Ireland* (1969) 70 Cal.2d 522, 538.) Here, the jury was instructed on three felonies in addition to murder: leaving the scene of an accident resulting in death or serious permanent injury, gross vehicular manslaughter, and involuntary manslaughter. The first of these, felony leaving the scene of an accident, was not an inherently dangerous felony and so could not support application of the felony-murder rule.<sup>2</sup> The remaining felonies could not support felony-

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<sup>1</sup> Williams has also filed a petition for writ of habeas corpus (A101013) related to this appeal. By separate order filed on this same date, we deny the petition.

<sup>2</sup> A felony is inherently dangerous if and only if it “cannot be committed without creating a substantial risk that someone will be killed.” (*People v. Burroughs* (1984) 35

murder because of the merger doctrine, which precludes bootstrapping every felonious assault or manslaughter into murder. (*Ireland*, at p. 539.)

Consequently, it was error to give an instruction that might suggest that the jury could return a verdict of second degree murder under a felony-murder theory. Trial courts have a duty to refrain from instructing on principles of law that are irrelevant to the issues and have the effect of confusing the jury or relieving it from making findings on relevant issues. (*People v. Rowland* (1992) 4 Cal.4th 238, 282; *People v. Saddler* (1979) 24 Cal.3d 671, 681.) Nothing in the prosecution of this case was based on the felony-murder doctrine. It was therefore error to give an instruction without any factual application to the case. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 280 (conc. opn. of Mosk, J.).)

Williams contends the error was prejudicial because it permitted the jury to convict him of murder without having to find malice. When a jury is instructed on an irrelevant theory that may inject confusion into its deliberations, we ask whether “there is ‘a reasonable likelihood’ the jury understood the instruction as defendant asserts.” (*People v. Cain* (1995) 10 Cal.4th 1, 36, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) When making this determination, “[i]t is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record. [Citation.]” (*Estelle v. McGuire*, at p. 72; see also *People v. Cain*, at p. 36; *People v. Mincey* (1992) 2 Cal.4th 408, 451; *People v. Price* (1991) 1 Cal.4th 324, 446.)

We conclude after consideration of the entire record that the error was harmless; there is no reasonable likelihood that the instruction misled the jury to think it could find Williams guilty of second degree murder without finding malice. (Cf. *Rowland*, *supra*, 4 Cal.4th at p. 282.) Neither the prosecutor nor the court ever intimated that finding

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Cal.3d 824, 833, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Felony leaving the scene need not involve a substantial risk of death; it is enough to establish the felony that one leaves the scene of an accident causing “permanent, serious injury.” (Veh. Code, § 20001, subd. (b)(2).)

Williams guilty of a felony could substitute for a finding of malice in support of a murder conviction. The instructions clearly required the jurors to find malice in order to convict Williams of murder.

The jury was specifically instructed that the crime of murder required a finding of malice: “In order to prove this crime, each of the following elements must be proved: [¶] One, a human being was killed; [¶] Two, the killing was unlawful; and [¶] Three, the killing was done with malice aforethought. [¶] Malice is implied when: [¶] One, the killing resulted from an intentional act; [¶] Two, the natural consequences of the act are dangerous to human life; and [¶] Three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. [¶] When it is shown that a killing resulted from an intentional doing of an act with implied malice, no other mental state need be shown to establish the mental state of malice aforethought.” (CALJIC Nos. 8.10, 8.11.) With respect to second degree murder, the definition of implied malice was repeated: “Murder of the second degree is the unlawful killing of a human being when: [¶] One, the killing resulted from an intentional act; [¶] Two, the natural consequences of the act are dangerous to human life; and [¶] Three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.” (CALJIC No. 8.31.) The court further instructed that a killing without malice is involuntary manslaughter. (CALJIC No. 8.45.)

Significantly, the trial court did not instruct the jury on felony murder beyond the single sentence identified by Williams. The trial court carefully redacted any reference to felony murder from CALJIC No. 8.10. Neither CALJIC Nos. 8.21 nor 8.32 (defining first- and second-degree felony murder) were given. No felony was identified as an allowable predicate for felony-murder liability. The verdict form did not ask the jury to identify a predicate offense underlying its finding of murder.

Additionally, the prosecutor in this case never argued the felony-murder rule. (See *People v. Kelly* (1992) 1 Cal.4th 495, 526 [“The arguments of counsel also correctly explained the relevant law.”].) Instead, the prosecution’s case was based solely on a theory of an unlawful killing with implied malice. In her opening statement, the

prosecutor made no reference to any underlying felony; instead, she stated that the murder charge would be based on evidence that Williams acted intentionally with knowledge of and disregard for the risks to others' lives. In closing, the prosecutor told the jury, "This is an implied malice murder case." She explained that murder required malice aforethought, and made an explanation of the evidence of implied malice the centerpiece of her closing argument. She argued that the killing was second degree murder because Williams drank and drove with a .25 blood-alcohol level, with knowledge of the risk that posed to human life, and failed to stop his car, with knowledge that there was someone caught underneath it. She devoted her entire rebuttal to the evidence of implied malice. At no point did the prosecutor mention felony murder.

Defense counsel also discussed the prosecution's burden of proving malice in order to sustain a conviction for murder: "We're talking about an allegation, a charge of an implied malice murder." Counsel explained that the difference between manslaughter and murder was that murder required proof of malice, and discussed the evidence of implied malice at length. Williams's defense was that he lacked actual knowledge of the lethal danger his actions created—in other words, that he had not acted with implied malice. Counsel closed by arguing, "Mr. Williams is not a murderer because he didn't act with malice aforethought." Defense counsel did not respond to the prosecution's case as if the prosecution had presented a felony-murder theory.

In our view, this record and these instructions made it unmistakably clear that in order to convict of murder, the jury was required to find malice. This case is analogous to *People v. Barnett* (1998) 17 Cal.4th 1044, 1154. The trial court in *Barnett* instructed, in pertinent part: " . . . The crime of murder is the unlawful killing of a human being with malice aforethought *or unlawful killing of a human being which occurs during the commission or attempted commission of a felony inherently dangerous to human life.* [¶] In order to prove the commission of the crime of murder, each of the following elements must be proved. . . . [T]he killing was done with malice aforethought.' " (*Ibid.*) *Barnett* argued that this instruction could have allowed the jury to convict of murder based on felonies that were impermissible under the merger rule. The Supreme Court held that

there was no error because the other instructions clearly informed the jurors that there could be no conviction of first degree murder unless they found deliberation and premeditation. (*Ibid.*) Further, the record made it clear that the prosecutor was seeking a conviction based upon the theory of deliberate and premeditated murder, not felony murder. (*Id.* at p. 1155.) Accordingly, the court concluded, “no reasonable juror could possibly have understood that guilt could be predicated upon a felony-murder theory.” (*Ibid.*)

Similarly, in *People v. Cisneros* (1973) 34 Cal.App.3d 399, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30, footnote 8, defendant argued that an instruction referencing felony murder relieved the jury of the need to find malice before returning a second degree murder conviction. The court rejected the claim after reviewing the instructions as a whole: “In this case the references to felony second degree murder were only tangential. There was no instruction directing the jury’s attention to a particular felony, such as assault with a deadly weapon or any other felony which might either be an offense which was an integral part of the homicide, or which, although a felony, was not in the abstract inherently dangerous to human life. It is concluded that in viewing the instructions as a whole, the jurors were not relieved of the necessity of making a specific finding of malice aforethought before returning a verdict of second degree murder.” (*Cisneros*, at p. 433.)

Finally, in *People v. Roy* (1971) 18 Cal.App.3d 537, disapproved on other grounds in *People v. Ray*, *supra*, 14 Cal.3d at p. 29, the trial court instructed the jury, in part, that implied malice could be found “ ‘when the killing is a direct causal result of the perpetration or the attempt to perpetrate a felony inherently dangerous to human life.’ ” (*Roy*, at p. 550.) In rejecting the contention that this instruction misled the jury into believing that felony murder applied, the court stated: “The jury could not have been misled by the instruction. Unlike *Ireland*[, *supra*, 70 Cal.2d 522] defendant was not charged with felony murder, instructions on second degree felony murder identifying the felony as assault with a deadly weapon and defining its elements were not given, and the prosecutor did not argue a theory of felony murder.” (*Roy*, at p. 550.)

As in *Barnett*, *Cisneros*, and *Roy*, we conclude that the instructions and record as a whole render any error harmless. The jury was correctly instructed on the elements of murder, including implied malice, and the prosecution never argued felony murder. On this record, there is no reasonable likelihood that the jury misinterpreted the language of CALJIC No. 8.51 to eliminate the requirement, repeatedly stated elsewhere in the instructions and argument, that the jury find malice in order to return a verdict of murder.

The two cases upon which Williams principally relies, *People v. Sanchez* (2001) 86 Cal.App.4th 970 and *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, are distinguishable. In *Sanchez*, the trial court gave a version of CALJIC No. 8.10 that told the jury it could return a murder verdict if it found the killing occurred in the course of evading a peace officer, without finding malice. (*Sanchez, supra*, 86 Cal.App.4th at p. 977.) The prosecution argued felony murder as an alternative to a finding of malice. (*Id.* at p. 981.) Thus, the jury clearly was presented with felony murder as an alternative to finding implied malice. Because the felony charged was not an inherently dangerous felony, this was reversible error. In *Suniga*, the same instructional error occurred. The trial court gave a version of CALJIC No. 8.10 that offered felony murder as an alternative theory to implied malice, and specifically defined assault with a deadly weapon as a predicate felony that could support felony murder. (*Suniga v. Bunnell, supra*, 998 F.2d at p. 666.) Because assault with a deadly weapon cannot support felony murder, this was reversible error. Thus, in each case, the jury could reasonably believe that felony murder offered an alternative way to reach a murder verdict, without the need to find malice. Here, in contrast, the trial court's definitions of murder and counsels' arguments to the jury each emphasized that malice was an essential prerequisite to a murder verdict; "no reasonable juror could possibly have understood that guilt could be predicated upon a felony-murder theory." (*Barnett, supra*, 17 Cal.4th at p. 1155.)

#### DISPOSITION

The judgment is affirmed.



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GEMELLO, J.

We concur.

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JONES, P.J.

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STEVENS, J.